IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Central Excise Reference No. 05 of 2003
(Old No. 36 of 2001)

M/s Owens Bilt Limited
now known as Owens
Brockway India Ltd,
Rishikesh. **……..Applicant**.

Versus

1. Commissioner of Central Excise, Meerut-I, Meerut.
2. Customs, Excise & Gold (Control), Appellate Tribunal, New Delhi.

…….Respondents

Coram:
Hon'ble P.C. verma, J.
Hon'bles M.M. Ghildiyal, J

Heard Sri P.R. Mullick, learned counsel for the applicant and Sri Arvind Vashishta, learned ASG, for respondents.

This is an application for reference to require the Appellate Tribunal to refer the matter on the questions of law framed in the Memo of Reference under sub section 3 of section 35 G as it stood prior to enforcement of Finance Act, 2003.

We have perused the refusal order passed by Tribunal, which is short order, therefore, it is useful to reproduce the same as under:

"The applicant has submitted this application praying that a reference may be made to the Hon'bel Allahabad High Court as points of law arise out of Tribunal's Final Order No. A/632/99-NB dated 11.05.1999. The questions that arise out of the order are as under:

1. *Whether the Tribunal can ignore the production slips for arriving at excess production, if any?*

2. *Whether the Tribunal was correct in not taking into consideration the stocks in From V Register (re-processing register) which goods were subsequently reprocessed with permission of Range Officer?*
3. *Whether the Tribunal was justified under law to refuse to upheld a settled law to give set off of shortages against excesses of same commodity?*
4. *Whether the Tribnal can ignore the affidavit of applicant regarding Form-V stocks?*
5. *Whether the Tribunal was justified in not applying their mind to the argument that the opening balance as per records on day of visit were taken and subsequent production and clearance were assessed by department, in such a situation the duty on shortages would amount to demand of duty twice.*

2. *Arguing the case for the applicant Sri Alok Arora, Ld. Counsel submits that the Tribunal ignored the production slips for arriving at excess production, which is not warranted. He submits that the Tribunal had not taken into consideration the stocks in Form V Register, that the goods were received for re-processing which were entered into Form V Register and were subsequently, processed. He submits that it is well settled position that shortages should have been allowed to be set off against excesses of the same commodity. He submits that an affidavit was filed regarding From V stocks which was not taken into consideration. Learned Counsel submits that the opening balance as per records on the day of visit was taken and subsequent production and clearance were assessed by Department, in such a situation the duty on shortages would amount to demand of duty twice. He submits that in the light of above pleas the questions of law as indicated above arise. He submits that since these are*

questions of law, they may be referred to the Hon'ble High Court for the considered views.

3. Sri R. D. Negi, Ld. DR submits that the points made as questions of law are nothing but a request for review of the orders. He submits that none of them indicates a question of law. He, therefore, prays that the reference application may be rejected.

4. We have heard submissions. We have also perused the points which are formulated as the questions of law. We note that points stated to be questions of law are nothing but a request for review of the order of the Tribunal.

In point no. 3 the applicant has stated whether the Tribunal has justified under law to refuse to uphold a settled law to give set off of shortage against excesses of same commodity. In the instant case we note that it is not a settled law that shortage may be set off against excesses of the same commodity. The Tribunal in the impugned order held

"Having regard to the above discussion, we hold that the shortages and excesses were correctly, determined and, therefore, since the above amount was not recorded in the statutory records that has rightly been confiscated. We uphold the confiscation of goods found in excess. In so far as shortages are concerned since the appellants have not been able to explain, therefore, the duty has correctly, been taken on the shortage."

5. Thus, we find that at the time of visit of the Officers, the appellant could not show them the breakages, which were claimed. We also not hat the goods found short and found in excess were of different variety and therefore, there was no question of any set off of the shortages against excesses. Thus, it cannot be said that a point of law arises in as much as it is the fact of t he case which will be different in each case that will determine the set off and thus, no question of

law arises on this score. Production or maintenance of record and its acceptance or rejection depends on the facts and circumstances of the case and thus ignoring the affidavit of the applicant regarding Form V stocks does not create a question of law. It is only a matter of fact whether in the evidence available on record what status should be given to that particular document. In so far as the opening balance and subsequent, production and clearances is concerned, it is a matter of examination of facts and no point of law arises. In the circumstances, the reference application is rejected.

From the nature of questions framed, it is clearly evident that these questions are relating to dispute of fact and Tribunal has rightly rejected the application on the ground that no question of law arises, accordingly, the application is rejected. However, it is open for the Assessee to avail the remedy, if any, available in the Act.

(M.M. Ghildiyal, J) **(P.C. Verma, J.)**

September 11,2007
SKS